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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN RE
REVIEW OF THE COMMISSION'S REGULATIONS GOVERNING PROGRAMMING PRACTICES OF BROADCAST TELEVISION NETWORKS AND AFFILIATES

MM Docket No. 95-92

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COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

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October 30, 1995

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SUMMARY

The Network Affiliated Stations Alliance, a coalition of the affiliate associations of the ABC, CBS and NBC Television Networks that represents the more than 600 television broadcast stations affiliated with these three networks, urges the Commission to preserve the three essential rules that permit network affiliates effectively to serve their communities of license and to maintain control over their own programming. These three essential rules are the "right to reject" rule, the "option time" prohibition and the "exclusive affiliation" rule. We agree, however, that the Commission may liberalize substantially the "territorial exclusivity" and "dual network" rules.

The proposals to modify the three network-affiliate rules are based on the assumption that the balance of power in the network-affiliate relationship has tipped in favor of affiliates. This assumption is demonstrably false. As the attached study of National Economic Research Associates, Inc. demonstrates convincingly, affiliates have not gained in power since the Commission reaffirmed the network-affiliate rules in 1980. *See* P. Beutel, H. Kitt & L. McLaughlin, *Broadcast Television Networks and Affiliates: Economic Conditions and Relationship — 1980 and Today* (1995) (attached hereto). The networks, recently freed to become full-fledged program producers, have become massive network-studio conglomerates that have the incentive and power to demand uniform clearance of network programming. There is no record basis for altering these three essential rules, and the proposals to repeal or amend these rules should be rejected.

The right-to-reject rule is the essential mechanism by which affiliates maintain the ability to select programming that is in the interests of the communities they are licensed to serve. Tying the right to reject solely to

instances where an affiliate can justify — to its network and, chillingly, to the United States Government — that it has selected programming without regard to "financial considerations" would be functionally identical to repealing the rule. Permitting networks to obtain "options" in blocks of time, subject only to notice periods that would be insufficient to permit affiliates to secure adequate replacement programming, would permit networks to exercise essentially unreviewable control over entire time periods. Allowing networks to obtain "exclusive affiliations" would prevent affiliates from broadcasting programming that is of interest to their communities and hinder the development of new networks.

These three rules have served the Nation well. A thriving and effective national-local partnership that is the envy of the world has been built around this regulatory structure. Any network that claims it is harmed in its ability to obtain a national audience by the operation of these rules bear a heavy burden of proof — already, affiliates broadcast network programming for almost 98 percent of prime time. These rules simply provide a safety net that is crucial for affiliates to continue serving their local communities. Particularly in light of the staggering changes that are taking place in the television marketplace, it would be exceptionally unwise to endanger our system of local broadcasting by eviscerating these essential rules. The rules should be retained.

CONTENTS

Summary i

INTRODUCTION 1

ARGUMENT 5

I. THE ESSENTIAL NETWORK-AFFILIATE RULES HAVE BEEN SUCCESSFUL IN CREATING OUR SYSTEM OF BROADCASTING AND ARE EVEN MORE IMPORTANT IN TODAY'S MARKETPLACE. 5

A. The Commission's Minimally Intrusive Protection of Local Affiliate Autonomy Is Essential To Achieving The Goals of the Communications Act 5

B. The Balance Of Power In The Network-Affiliate Relationship Continues To Tilt In Dramatic Favor Of The Network 8

II. THE THREE ESSENTIAL NETWORK-AFFILIATE RULES PROVIDE A MINIMALLY INTRUSIVE SAFETY NET FOR LOCAL BROADCASTER AUTONOMY THAT MUST BE PRESERVED 12

A. The "Right to Reject" Rule Must Not Be Eviscerated By Adoption of the Notice's Intensely Regulatory and Unworkable Proposal 13

B. The Option Time Prohibition Serves The Public Interest And Should Not Be Modified 20

C. The Prohibition Against "Exclusive Affiliations" Continues To Serve The Public Interest and Must Be Preserved. 25

III. THE CUMULATIVE IMPACT OF REPEALING THE NETWORK-AFFILIATE RULES IN A YEAR WHEN OTHER REGULATORY PROTECTIONS HAVE BEEN DISMANTLED WOULD ENDANGER LOCAL CONTROL OF TELEVISION BROADCASTING. 30

A. The 1995 Transformation of the Broadcast Television Marketplace Has Increased the Power of the Networks and Reinforces the Continuing Need for the Network Rules. 31

B. The Cumulative Impact of Subjecting the Three Essential Network-Affiliate Rules to Piecemeal Dismemberment Would Improperly Consolidate Network Control Over Local Affiliates. 37

IV. THE COMMISSION'S PROPOSED MODIFICATIONS TO THE TERRITORIAL EXCLUSIVITY RULE MAY BE ADOPTED SO LONG AS EXISTING AGREEMENTS ARE NOT UNDERMINED. 39

V. THE AFFILIATES AGREE THAT EVENTUAL REFORM OF THE DUAL NETWORK RULE IS IN ORDER. 40

CONCLUSION 41

Attachment

Phillip A. Beutel, Howard P. Kitt, and Linda McLaughlin, National Economic Research Associates, Inc., *Broadcast Television Networks and Affiliates: Economic Conditions and Relationship — 1980 and Today* (October 27, 1995)

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In re	)	
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Review of the Commission's	)	MM Docket No. 95-92
Regulations Governing	)	
Programming Practices of	)	
Broadcast Television	)	
Networks and Affiliates	)	

TO: The Commission

COMMENTS OF THE
NETWORK AFFILIATED STATIONS ALLIANCE

INTRODUCTION

The Network Affiliated Stations Alliance ("NASA" or "Affiliates"), a coalition of the affiliate associations of the ABC, CBS and NBC Television Networks that represents the more than 600 television broadcast stations that are affiliated with these three networks, urges the Commission to preserve the three essential rules that permit network affiliates effectively to serve their communities of license and to maintain control over their own programming. These three essential rules are the "right to reject" rule, the "option time" prohibition and the "exclusive affiliation" rule, 47 C.F.R. §§ 73.658(e), 658(d) and 658(a) (1994). As the attached study performed by National Economic Research Associates, Inc. demonstrates convincingly, the balance of power in the network-affiliate relationship stands unaltered since the Commission's 1980 affirmance of the network-affiliate rules. *See* P. Beutel, H. Kitt & L. McLaughlin, *Broadcast Television Networks and Affiliates: Economic Conditions and Relationship — 1980* *and Today* (October 27, 1995) (attached hereto) ("*NERA Study*"). This study fatally undercuts the proposals of the Notice of Proposed Rule Making in this docket (the "*Notice*") and supports the continuing validity of the public interest premises on which these three rules are based. There is no record basis for altering any of these three essential rules, and the proposals to repeal or amend these rules should be rejected.

NASA agrees with the Commission, however, that the "territorial exclusivity" rule may be modified as proposed by the *Notice* consistent with the public interest, with appropriate safeguards that we discuss below. NASA also agrees that the "dual-network" rule may, at an appropriate time, be liberalized substantially.

* * *

The three essential network-affiliate rules at stake in this docket are central to maintaining broadcasters' ability to serve their communities of license. These rules, unlike some others that the Commission properly should eliminate, do not "mindlessly micromanage the strictly commercial aspects of broadcasting."[1] Quite to the contrary, these rules preserve broadcasters' essential ability to serve the public.[2] In ensuring a healthy diversity of control over television programming, these rules form a part of what one Commissioner has termed a

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[1] R. Hundt, *A Letter to the Industry*, BROADCASTING & CABLE, Oct. 9, 1995, at 87 (citing prime-time access rule as an example).

[2] As in another context, "the issue for the FCC is what would happen to localism and public service. The Commission has to take that into consideration." R. Shaw, *Digital Audio to Squeeze Radio, Say Critics*, Electronic Media, Sept. 11, 1995, at 12 (quoting Commission Chief Economist Michael Katz).

"freedom insurance policy."[3] The rules have become even more crucial in recent years as networks have insisted upon long-term affiliation agreements that have made it more difficult for affiliates to exercise independent programming judgments. If affiliates lose the ability to effect true local control over the content of television programming, the long-standing goals of the Communications Act and of decades of Commission policy simply cannot and will not be achieved.[4]

The regulatory structure enabled by these rules properly emphasizes local decisions. It permits affiliates to make *local* programming decisions while preserving the networks' interest in building an audience for high-quality national programs. In fact, affiliates today overwhelmingly exercise their choice to accept network programming — affiliates broadcast network programming for 97.7 percent of prime time and 89.7 percent of non-prime time. *See NERA Report* at 34, Table 16. But affiliates present substantial amounts of local programming as well, and must have the flexibility to broadcast that programming when, in their judgment, it is necessary to do so. The real issue here is local choice versus national control — whether the local control of affiliates will be preserved or whether networks will be permitted to use their substantial economic leverage over affiliates to overrun local programming choices in favor of uniform national programming.

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[3] *See* Remarks of Commissioner Susan Ness Before the Texas Association of Broadcasters, San Antonio, Texas, Sept. 30, 1995 (rel. Oct. 3, 1995).

[4] Very early in the history of American broadcast regulation, the role of the licensee developed as that of a "public trustee" with the corresponding responsibility of serving its community of license. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973). The emphasis behind regulation of the broadcast media has been primarily on the interest, convenience, and necessity of the listening public and not that of the broadcaster or advertiser. Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 134 n. 2 (1939) (citing Second Annual Report, Federal Radio Commission, 1928, pp. 169-70).

It is significant that no one has, to date, suggested any harm that arises from the rules at issue here. Clearly, the networks are not being harmed by massive preemptions; indeed, the lack of preemptions demonstrates that networks obviously have enough power over affiliates to accomplish virtually universal clearances. As the Chairman has noted, the "broadcast television networks have the wealth of Midas and the creativity of Michelangelo"[5] — the networks clearly are not entities that need regulatory reform to thrive. Nor has anyone pointed to any significant public interest benefits that would accrue from changing them as dramatically as the *Notice* proposes. There is no justification for altering a regulatory balance that has contributed substantially to the quality and integrity of our broadcasting system. In adopting these rules and repeatedly reaffirming their importance, the Commission has relied on a series of public-interest benefits that are fostered by the rules. In the absence of a compelling showing that these public-interest justifications no longer apply, the rules should continue in force. The burden must be on those advocating their abolition. As will be shown below, these rules are more relevant today than ever as the chasm between the motives and bargaining power of enormous network-studio conglomerates and network affiliates has grown. The rules should be retained.

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[5] R. Hundt, *A Good Day for Kids*, Address to Center for Media Education, at 6 (Oct. 18, 1995).

ARGUMENT

I. THE ESSENTIAL NETWORK-AFFILIATE RULES HAVE BEEN SUCCESSFUL IN CREATING OUR SYSTEM OF BROADCASTING AND ARE EVEN MORE IMPORTANT IN TODAY'S MARKETPLACE.

A. THE COMMISSION'S MINIMALLY INTRUSIVE PROTECTION OF LOCAL AFFILIATE AUTONOMY IS ESSENTIAL TO ACHIEVING THE GOALS OF THE COMMUNICATIONS ACT.

American broadcasting is unique because of the national/local partnership created by the network-affiliate relationship. The value of this partnership to the American public derives from its unique ability to maximize the core communications policy values of diversity, localism, and universal availability. This ability is critically dependent upon the integrity of the network-affiliate relationship, a relationship which combines the "efficiencies of national production, distribution and selling with *a significant decentralization of control over the ultimate service to the public.*"[6] The national network-local affiliate distribution alliance that forms the centerpiece of the local broadcast system has achieved these core goals to a degree unsurpassed in the world.

The network/affiliate relationship has produced a television programming system that reflects the diversity of our Nation.[7] This relationship "is a true partnership serving the interest of both partners and the public interest by

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6 H. Rep. No. 100-887, 100th Cong., 2d Sess. 20 (1988) (emphasis added).

7 "[C]onsiderable credit for its existence must go to the framework in which it is broadcast — a framework formed by the national programming networks . . . [and local stations'] synergy of local and national offerings." Report on Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600, 5 F.C.C. Rcd. 4962, 5037 (1990); *see* Report and Order On Program Exclusivity, 3 F.C.C. Rcd. 5299, 5311 (1988) ("Our country has made a substantial investment in free, local over-the-air service that has and continues substantially to promote the public interest").

combining efficiencies."[8] The salient feature of this partnership is its crucial local component — the programming choice that is exercised by affiliates.[9] Other countries, which followed models based on state-owned media or national monopolies, have come to recognize the benefits of the U.S. system and are attempting to reform their systems to emulate ours.[10] Nations around the world increasingly are growing to understand that local control, as opposed to national control, is the *sine qua non* of responsive, public-spirited broadcasting.[11] It is a lesson that we should not be required to relearn.

Reliance upon the judgment of the licensee, and not that of a distant, centralized national programming source, to make the essential decisions concerning service to the broadcaster's community of license is central to our system of broadcasting. It is the local licensee, not any programmer or network organization, that ultimately is responsible both to its audience and to the

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[8] Scrambling of Satellite Television Signals (Report), 2 F.C.C. Rcd. 1669, 62 R.R.2d 687, 732 (1987).

[9] The mandate that licensees must hold unfettered control of their broadcast licenses is central to the Communications Act and, indeed, predates it. In enacting the Radio Act of 1927, Congress reacted to "widespread fear" that monopolies would dominate the broadcast field in the absence of appropriate government regulation. Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1939). In drafting even the 1927 Act, "Congress chose to leave broad journalistic discretion with the licensee." Columbia Broadcasting Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94, 105 (1973).

[10] *See, e.g.*, Noam, TELEVISION IN EUROPE 3 (1991) (centralized structures have limited consumer choice); M. Price, *Comparing Broadcast Structures: Transnational Perspectives and Post-Communist Examples*, 11 CARDOZO ARTS & ENT. L.J. 275, 281 (1993).

[11] Even cable operators have begun stressing localism as one of its "strategic assets," noting that "broadcast networks have [a] national focus." COMMUNICATIONS DAILY, Sept. 25, 1995, at 7 (comments of TCI Chief Operating Officer Brendan Clouston).

Commission.[12] This fundamental obligation requires that licensees have "an affirmative, non-delegable duty to choose independently all programming for broadcast, in light of the tastes and ascertained needs and problems of the community."[13] A broadcaster is not fulfilling its obligation to its community "if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory."[14]

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[12] *See* Cosmopolitan Broadcasting Corp. v. Federal Communications Comm'n, 581 F.2d 917, 921 (D.C. Cir. 1978). The integrity of this structure is critical to the Commission's ability to regulate the broadcasting industry:

> These regulations were promulgated to ensure that the licensees of radio stations who become affiliated with the various networks did not, formally or informally, surrender control of the day-to-day operation of their stations to the networks. Licensee responsibility is an integral part of the statutory scheme. . . . The Communications Act makes the individual licensee responsible for the operation of his station and requires that he maintain control of that operation in order to carry out the proposals made to the Commission. Unless the licensee retains complete control of his station, the Commission has no one whom it can hold responsible for the operation of the station and the Commission's statutory duty to ensure that broadcast licensees operate their stations in the public interest would be effectively frustrated.

Don Lee Broadcasting System, 5 R.R. 1179, 1198 (1950), *quoted in Network Broadcasting: Report of the Network Study Staff*, H. Rep. No. 1297, 85th Cong., 2d Sess. 142-43 (1958).

[13] Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting, 63 F.C.C.2d 674, 690 (1977); WCHS-AM-TV Corp., 8 F.C.C. 2d 608, 609 (1967). As the Commission has stated unambiguously:

> [R]esponsibility for selecting program material lies with the licensee. That responsibility can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments.

Cosmopolitan Broadcasting Corp., 59 F.C.C. 2d 558, 561 (1976) (citation and internal quotations omitted).

[14] *Report on Chain Broadcasting* 66 (Docket 5060, May 1941) ("*Chain Broadcasting Report*"), *modified, Supplemental Report on Chain Broadcasting* (1941), *appeal dismissed sub nom.* NBC v. United States, 47 F. Supp. 940 (1942), *aff'd*, 319 U.S. 190 (1943).

The benefits of the network-affiliate partnership, as it has been structured under the ground rules that now are being assessed, have been pervasive. The efficiency and economies of the network-affiliate partnership have permitted American broadcasters to advance the Commission's longstanding goal, grounded in Section 307(b) of the Communications Act, of fostering an abundance and diversity of programming responsive to the needs and interests of local communities. If control of local programming decisions is lost to national programmers, the right and responsibility of broadcasters to choose the programs that best suit their local communities will be eviscerated. The public's ability to have a meaningful opportunity to participate in local programming decisions would be lost. For this reason, as we discuss more specifically below, the rules under review should be maintained.

B. The Balance Of Power In The Network-Affiliate Relationship Continues To Tilt In Dramatic Favor Of The Network.

The relationship between a network and its affiliates rests upon a delicate balance of bargaining power. Because the Commission repeatedly has found that this balance tilts in favor of the network, it has adopted network-affiliate rules that protect the independent programming judgments of local stations. These rules, at bottom, assure a degree of much-needed parity in the central area of negotiation in the network-affiliate relationship: the ability of a local affiliate to retain control over the selection of the programming that it will deliver to its local audience. Whether that ability would be endangered by elimination or weakening of the rules at issue may be assessed, in part, by a determination of whether affiliates have gained increased leverage and bargaining power in the decade and a half since the Commission last correctly declined to repeal these rules.[15]

There has been substantial debate — and, we believe, much confusion and misunderstanding — about the perceived changes in influence that some believe have occurred during this time period. NASA consistently has asserted, based on the Affiliates' combined business dealings with the networks, that changes in affiliate compensation and affiliation switches have not altered the essential balance of power between networks and affiliates. Because the value of a network affiliation continues to be substantial, and because the threat of losing that affiliation is too dangerous to risk in today's tenuous, competitive and fragmented broadcasting environment, networks can exercise significant power over affiliates. Nothing has changed in this regard since the adoption of the three rules under review here; affiliates, in our practical and daily experience negotiating with the networks, have no more leverage today than in years past in effecting changes in the network affiliation contract to lessen network control over programming decisions.

This viewpoint, which is rooted in the reality of the business relationships with which the Affiliates are intimately familiar, now has been validated by empirical evidence. The comprehensive economic analysis of the network-affiliate relationship performed by National Economic Research Associates, Inc. demonstrates convincingly that affiliates do *not* have greater bargaining power today than they had in 1980. *See NERA Study*. This conclusion confirms the positions consistently taken by the Affiliates before the Commission on the basis of affiliates' experience in bargaining with networks — in the ongoing

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[15] *See* Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report* (October 1980); *Notice*, ¶ 4.

relationship between networks and affiliates, networks clearly and continually have the upper hand because of the overwhelming value of a network affiliation to a broadcast station.

By every appropriate direct measure of the network-affiliate relationship — network compensation, network and affiliate profitability, and network clearance rates — affiliates have not gained increased bargaining power. *See NERA Study* at 10-12. By every valid external factor that has been raised to claim a change in the relationship between networks and affiliates — the growth of cable, the growth in the number of networks and stations, the supposed ascendance of group ownership, and the value of affiliation — affiliates have not gained increased bargaining power. *See id.* at 3-10.

The results of the *NERA Study* undercut the assumptions on which the *Notice*'s proposals are based. The basic assumption of the *Notice* is that affiliates have grown in power while networks have been subjected to increasing competition, a trend that has decreased network dominance over affiliates. As the *NERA Study* shows, however, this is not the case:

- The increase in both numbers of stations and networks in the past 15 years favors the networks, not the affiliates. While the Fox network now has become more competitive with the three major networks, the UPN and Warner Brothers networks do not now offer a reasonable substitute for a major-network affiliation. Today, there are more markets that contain more stations than networks than was the case in 1979. *See id.* at 3-5, Tables 1 and 2.

- Network affiliation is as attractive an option today as it was in 1980, as measured by relative profitability of affiliates and independent stations, the extent to which stations forego affiliation, and local market viewer share. *See id.* at 8-10, Tables 8, 9A, 9B, 10A, 10B, 10C, 11, 12A and 12B.

- Network compensation, on average, is only slightly higher in 1993 than in 1980 — and, after adjusting for inflation, network compensation in 1993 was actually *40 percent lower* than in 1980. Even more significantly, the median affiliates had lower compensation even before adjusting for inflation. *See id.* at 10-11, Table 13. If affiliates actually had gained bargaining power over this period, network compensation would have increased (although even an increase in compensation, standing alone, would not necessarily indicate an increase in bargaining strength).

- Contrary to the *Notice*'s assumption that there has been a trend toward group ownership that would leaven bargaining power among networks and affiliates, the *NERA Study* demonstrates that the percentage of group-owned stations actually declined between 1981 and 1994. There has been only a slight increase in coverage by the major non-network group owners, and those owners generally have retained stations with a variety of differing affiliations; this variety precludes any significant gain in bargaining advantage for group-owned affiliates. Conversely, however, there has been an increase in group ownership by the networks. *See id.* at 6, Tables 5 and 6.

- Both networks and affiliates have been adversely affected by the growth of cable, although networks remain the largest share category. *See id.* at 7-8, Tables 7 and 8.

- Profits of the three major networks increased more than profits for the typical affiliate between 1980 and 1993. *See id.* at 11 and Table 15.

It is simply not the case that affiliates have increased bargaining power as compared to the networks. It is, however, still the case that "the economic survival of [a] station may well depend upon . . . affiliation."[16] As NERA

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[16] Amendment of Section 3.658 of the Commission's Rules to Prohibit Television Stations, Other Than Those Licensed to an Organization Which Operates a Television Network, from Being Represented in National Spot Sales By an Organization Which Also Operates a Television Network, Report and Order, 27 F.C.C. 697, 713 (1959). As the Commission continued, "network programs are not only a substantial source of direct income to the affiliated station; they also attract the viewing audience and provide valuable adjacencies for the affiliate to sell to

found, changes in the television marketplace "have not, on balance, demonstrably diminished the attractiveness of network affiliation for a television station." *NERA Study* at 1. The ability of affiliates to serve their local audience and make unpopular and potentially risky decisions not to carry network programming has been ensured by the rules that are the subject of the *Notice*. Affiliates' ability to continue to serve their communities can only be maintained by retaining the minimally intrusive regulatory safety net that is provided by the three network-affiliate rules that are discussed below.

II. THE THREE ESSENTIAL NETWORK-AFFILIATE RULES PROVIDE A MINIMALLY INTRUSIVE SAFETY NET FOR LOCAL BROADCASTER AUTONOMY THAT MUST BE PRESERVED.

These three essential rules governing the network-affiliate relationship must not be altered, in whole or in part. The rules in question do not intrude into the business relationship between networks and affiliates but simply provide an important "safety net" to preserve affiliates' control over their stations. Pressure for "clearances" — local affiliates broadcasting network programming at the network-specified time — is a major force in the network-affiliate relationship that has not, and will not, diminish.[17] Because of the rules at issue here, network affiliates now have the ability to choose whether to clear network programming. And the networks cannot credibly complain that affiliates have frustrated their national programming ambitions because affiliates overwhelmingly

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national spot and local advertisers." *Id.* This also has not changed.

[17] Recent history demonstrates that networks have attempted to claim ever-increasing hours of the broadcast day for network programming. CBS, for example, put exceptional pressure on affiliates to carry new late-night programming uniformly throughout the country. *See* M. Freeman, S. Coe, J. Flint, *Late-Night Players Jockey for Clearance*, BROADCASTING & CABLE, Aug. 16, 1993, at 17.

choose to clear network programming now. Almost 98 percent of prime-time network programming was run by affiliates in 1994 and almost 90 percent of non-prime time programming was cleared, rates that are substantially higher than the clearance rates in 1977.[18]

Affiliates are not seeking to thwart the networks from obtaining their goal of national clearances by urging retention of these rules. In fact, the evidence demonstrates that affiliates have become more accommodating of that goal. Rather, affiliates seek only to retain the bedrock ability to make independent programming decisions, when their judgment deems it necessary, that serve their own communities rather than the networks. Without the three rules that are described below, that ability would be endangered if not eliminated.

A. The "Right to Reject" Rule Must Not Be Eviscerated By Adoption of the Notice's Intensely Regulatory and Unworkable Proposal.

The "right to reject" rule is the centerpiece of the network-affiliate regulatory scheme. That rule provides that networks cannot, by contract or otherwise, "prevent" or "hinder" network affiliates from rejecting network programming that the licensee finds to be unsatisfactory or contrary to the public interest or from substituting for network programming any "program which, in the station's opinion, is of greater local or national importance."[19] The right to reject rule confers upon licensees "the sole right and nondelegable responsibility to select the programs to be broadcast."[20] Not surprisingly, the rule has been

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18 *See NERA Study* at 37, Table 16.

19 47 C.F.R. § 73.658(e) (1994).

20 Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1040 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983).

viewed as the "most salient example" of the Commission's fulfillment of its statutory obligation to serve the public interest.[21]

1.

The *Notice*'s proposal to allow affiliates to preempt network programming under the rule only when preemptions are "based solely on financial considerations" would repeal the right-to-reject rule as a matter of practice.[22] This proposal, if adopted, would discourage affiliates from exercising control over programming and would create a staggering quagmire of administrative difficulties. How, for example, could government regulators determine whether an affiliate's invocation of its right to reject was "based solely on financial considerations"? The *Notice* itself recognizes that no bright-line test for program type would be workable (¶ 25), begging the question of how any regulator could discern the motives of the broadcaster in question to determine whether its rejection of network programming was, in fact, covered by the proposed rule. And the specter of the United States Government undertaking an inquisition into the motives behind a broadcaster's programming choices is a chilling one indeed.[23]

Most importantly, the rule as it now is formulated permits broadcasters to program to the needs, tastes and desires of their communities. The *Notice*'s proposal ignores the fact that a decision by an affiliate to reject network

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[21] *Id.* at 1040 n.19.

[22] *Notice*, ¶ 25.

[23] The futility of attempting to determine whether a programming decision was, in fact, based solely on "financial considerations" should be obvious. Proving internal motive or intent has long been recognized as one of the most elusive efforts in jurisprudence. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968) (inquiries into decisionmakers' motives "are a hazardous matter"); Pointer v. United States, 151 U.S. 396, 413 (1897).

programming based on financial considerations may fully serve the public interest by permitting the affiliate to present programming that its community values more highly than network programming and thus serve the needs, interests and tastes of its local audience. Surely it would be counterproductive to permit a broadcaster to make local programming decisions only if the programs it presents to its community are *less* highly demanded and *less* valuable to audiences and advertisers than the network programming that the affiliate has found to be unsuitable for its local audience. Put another way, economics and the public interest often coincide when broadcasters are empowered to serve fully the needs and interests of their communities. The sort of blatant intrusion into the economic marketplace contemplated by the *Notice*'s proposed revision of the right-to-reject rule would be virtually unprecedented. And the burdensome regulatory structure necessary to police this new rule of network-affiliate economics would tax the Commission's already overburdened resources.

Moreover, determining whether an affiliate rejected a network program "based solely on financial considerations" is likely to create a business relationship among networks and affiliates that would be contentious, difficult and ultimately unworkable. Affiliates would be required to spend valuable time justifying their programming decisions to their networks and, potentially and ultimately, to the Federal Government. Undoubtedly, as the Commission predicted in 1941, affiliates would tend to accept network programming that they otherwise would have rejected to avoid the extraordinary burden of justifying their programming decisions to outsiders.[24] The right-to-reject rule would be turned on its head — it would become an instrument by which affiliates would

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[24] *See Chain Broadcasting Report* at 66.

lose their effective program choice rather than a means by which local decisionmaking would be ensured.

2.

The *Notice*'s proposal also ignores the history of the right-to-reject rule and the clear public-interest rationale underlying it. When the right-to-reject rule first was adopted, the Commission was vitally aware that financial considerations played a role in affiliate programming. Before the rule's adoption, the NBC and CBS networks employed onerous contractual provisions requiring any affiliate rejecting a program to "be able to support his contention that what he has done has been more in the public interest than had he carried the network program."[25] The Commission found that an affiliate cannot permissibly be required by a network to prove the public interest superiority of a judgment rejecting network programming:

> It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer control of his station directly to the network. . . . He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest.[26]

Indeed, the "main thrust" of the rules is to "assure the local licensee greater freedom of action in programming for the needs of his particular community than

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[25] *Nat'l Broadcasting Co.*, 319 U.S. at 204.

[26] *Chain Broadcasting Report* at 66. The Commission noted that "these are principles of general application based on sections 301, 309, and 310 of the Communications Act." *Id.*

the highly exclusive and limiting arrangements with networks permitted prior to the adoption of the rules."[27]

The Commission wisely never has placed restrictions on the ability of affiliates to consider financial interests when deciding whether to preempt network programming. In fact, the Commission's consistent position has been that "affiliates should always remain free not to broadcast network programming — either commercial or non-commercial."[28] Maintenance of this policy is crucial to retaining the affiliates' ability to preempt programming for any reason:

> [If] the licensee is not allowed to reject a program unless he can prove to the satisfaction of the network that he can obtain a better program, his efforts to exercise real selection among network programs become futile gestures, and he soon proceeds to broadcast network programs as a matter of course.[29]

Accordingly, the Commission has recognized for decades that the affiliate must have the ability to preempt without an intrusive, intensively regulatory and constitutionally questionable inspection of its reasons and rationale for making that programming choice.

The Commission always has recognized that it cannot workably limit an affiliate's right to preempt its network to choices based solely on non-economic factors. In fact, the opposite has been the case — the network-affiliate rules were adopted to redress circumstances under which networks improperly coerced affiliates not to preempt for entertainment programming, particularly programs

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[27] *Network Broadcasting: Report of the Network Study Staff to the Network Study Committee*, H. Rep. No. 1297, 85th Cong., 2d Sess. 125 (1958) ("*Barrow Report*").

[28] *Network Broadcasting*, 63 F.C.C. 2d 674, 690 (1977).

[29] *Chain Broadcasting Report* at 66.

offered by competing networks. The circumstances when the rules were adopted were strikingly similar to today's marketplace: NBC and CBS affiliates carried the programs of the Mutual Broadcasting System ("Mutual"), often in competition with NBC and CBS programs. NBC and CBS responded by requiring exclusive affiliation and restricting preemptions. The Commission found that these provisions were contrary to the public interest "because the public is deprived of the opportunity to hear Mutual programs."[30]

In fact, the Commission was not concerned with local news or public affairs in adopting these rules but with entertainment programming — specifically, the 1939 World Series. Mutual had the right to broadcast the World Series, and CBS and NBC prevented their affiliates from carrying it even in markets where there was no other outlet.

> This prevented certain licensees from accepting a program for which they believed there was a public demand and which they thought would be in the public interest. It also . . . prevented the licensee from receiving income which would have been obtained from acceptance of the programming series. As a result, thousands of potential listeners failed to hear the World Series of 1939.[31]

Thus, the economic character of the programming to be substituted properly has been seen as irrelevant from the perspective of the Commission. The Commission must maintain this position to preserve local control of broadcasting.

3.

The essential inadequacies of the *Notice*'s proposals are demonstrated by the Commission's experience with its long-standing policy that networks cannot

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[30] *Chain Broadcasting Report* at 52.

[31] *Id.* at 52.

bind their affiliates to compensation plans that unduly penalize affiliates for broadcasting non-network programming.[32] "Incentive compensation" plans that properly have been struck down by the Commission essentially "tied" the network's less desired programming to carriage of its more desired programming.[33] The Commission found that the compensation scheme "hindered" stations from clearing "other network and non-network programs" and thus disserved the public interest and violated its rules.[34] This policy should be reaffirmed. If a compensation scheme is drastically non-proportional — that is, if the network provides compensation only for programs in which an affiliate sees little audience interest but little compensation for popular programs — the affiliate effectively is forced, for financial reasons, to carry programming that it would otherwise preempt in favor of other, more highly valued programming. The audience receives less preferable programming, and the workings of the marketplace for programming are skewed. The Commission should reaffirm that

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[32] *See* Columbia Broadcasting System, Inc., 22 R.R. 265, 270 (1961); Application of Section 3.658(a) of the Commission's Rules, 23 R.R. 769, 780 (1962).

[33] Under the plan, the network paid compensation at a low level (*e.g.*, 10 percent of the station's rate) up to a certain number of hours of clearances and then raised the rate dramatically (to, *e.g.*, 60 percent) for each remaining hour cleared. The number of hours at the cut-off point was calculated to match the number of "indispensable" hours the network provided. Because no affiliate could afford to totally abandon these programs, the obvious and expressly intended effect was to force the station to take the less desired programming in order to achieve a competitive compensation rate for the entire package.

[34] 23 R.R. at 780. "Block booking" or "tying" schemes similar to "incentive compensation plans" repeatedly have been found to be anticompetitive. *See, e.g.*, United States v. Loew's, Inc., 371 U.S. 38 (1962) (block booking of films for television violated Sherman Act); United States v. Paramount Pictures, Inc., 334 U.S. 131, 156 (1948) ("[w]here a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. . . . the requirement that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have").